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ABSTRACT

Judicial review is a fundamental facet of constitutional government in the United States. Invented during the founding of the United States, judicial review has spread to most constitutional democracies of the world. This digest discusses: (1) the concept of judicial review; (2) the origin of this concept; (3) the uses of this concept in U.S. constitutional government; (4) teaching points on judicial review; and (5) World Wide Web sites for teaching and learning about judicial review. (Contains 15 references.) (BT)

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Teaching about Judicial Review

By John J. Patrick

Judicial review is a fundamental facet of constitutional government in the United States of America. Invented by Americans during the founding of the United States, judicial review has spread to most constitutional democracies of the world. This Digest discusses (1) the concept of judicial review, (2) the origin of this concept, (3) the uses of this concept in U.S. constitutional government, (4) teaching points on judicial review, and (5) World Wide Web sites for teaching and learning about judicial review.

What Is Judicial Review? The power of the judicial branch of government to decide whether or not acts of government are constitutional is known as judicial review. By practicing judicial review, judges maintain limited government and the rule of law by upholding the supremacy of the Constitution relative to all branches of government. All courts in the United States, federal and state, may use the power of judicial review. The U.S. Supreme Court, however, has the final decision about the constitutionality of governmental actions (Hall 1985; Patrick 2001, 180-183).

Origins of Judicial Review. The U.S. Constitution does not mention judicial review. This power, however, was used before 1787 by courts in several of the American states to overturn laws conflicting with state constitutions. In 1789 the Congress of the United States passed the Judiciary Act, which gave federal courts the power of judicial review over acts of state government. This power was used for the first time by the U.S. Supreme Court in *Hylton v. Virginia* (1796).

In 1803, the power of judicial review was used for the first time by the U.S. Supreme Court to declare an act of Congress unconstitutional (*Marbury v. Madison*). In his opinion for the Court in *Marbury v. Madison*, Chief Justice John Marshall explained and justified the exercise of judicial review to strike down an unconstitutional act of Congress. He wrote, "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the legislature repugnant to the Constitution is void. This theory . . . is consequently to be considered, by this court as one of the fundamental principles of our society" (Patrick 2001, 206). Thus, an enduring precedent was set that has been the foundation for the federal judicial branch's power to declare unconstitutional any acts of coordinate branches of the federal government, the legislative and the executive branches, which violate the Constitution (Nelson 2000, 51-74).

The Uses of Judicial Review in U.S. Constitutional Government. Judges use their power of judicial review only in cases brought before them in a court of law. They do not make hypothetical decisions about the constitutionality of government actions. And they do not offer advice to government officials about the constitutionality of their actions outside the proceedings in courts of law.

Throughout United States history, the Supreme Court has used its power of judicial review to overturn as unconstitutional more than 150 acts of Congress and more than 1,000 state laws. The great majority of these invalidations have involved civil liberties and rights guaranteed by the U.S. Constitution. Thus, the Supreme Court has protected the rights of individuals in the minority against abuses by the federal or state governments (Patrick 2001, 182).

In his opinion for the Court in *West Virginia v. Barnette* (1943), Justice Robert Jackson explained why judicial review is used to protect minorities against the possible tyranny of majority rule. He wrote, "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections" (Patrick 2001, 364). When their constitutionally guaranteed rights are violated by the federal or state governments, individuals may appeal to the Court for relief through its power of judicial review.

Teaching Strategies. Judicial review is a core concept in the theory and practice of constitutional democracy in the United States and elsewhere in the world. Thus, teaching and learning this concept is essential to education for citizenship in a democracy—a main purpose of social studies education. Following are five strategies for teaching the concept of judicial review through the social studies curriculum.

1. Teach the idea of judicial review in concert with other core concepts in the theory and practice of constitutional democracy in the United States. In particular, stress that it is part of a basic principle of constitutional democracy in America, separation of powers with checks and balances among the three branches of government, which provides limited government and the rule of law (Patrick and Remy 1985, 150-156).

2. Teach how the idea of judicial review was defined, justified, and used in particular court cases during the founding era and early years of constitutional government in the United States (DeLacy 1986).

3. Use landmark cases of the U.S. Supreme Court to teach how judicial review was used by the justices to formulate and develop constitutional law during the nineteenth and twentieth centuries (Pacelle 1989).

4. Present controversies in U.S. history about different methods used by Supreme Court justices to interpret the Constitution when using judicial review (Patrick and Remy 1985, 158).

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For example, from the 1790s until today advocates of strict constitutional construction have clashed with proponents of broad construction. This kind of controversy about constitutional interpretation should be examined in connection with key constitutional issues in different periods of U.S. history.

5. Recognize the global spread of judicial review during the second half of the twentieth century. Examine why many countries have accepted this American idea of judicial review. Note the various adaptations or modifications of the American concept of judicial review by practitioners of constitutional government in other countries, including the use of "constitutional review" as the label of preference for this practice in most countries (Tate and Vallinder 1995).

World Wide Web Sites. The following Web sites offer resources for teaching and learning about judicial review in the United States.

Federal Judicial Center. This site provides information about the history of the federal judicial branch of government, including information about judicial review as it has been exemplified in landmark cases: <www.fjc.gov>.

Guide to Law Online: United States Judiciary. This Library of Congress Web site provides links to many other sites pertaining to the history and practices of the federal judiciary: <www.loc.gov/law/guide/usjudic.html>.

Legal Information Institute Supreme Court Collection. This site maintained by Cornell contains all U.S. Supreme Court opinions since May 1990 and 600 opinions in major cases throughout the court's history: <supct.law.cornell.edu/supct/index.php>.

Supreme Court of the United States. The official site of the Court includes information about the history and practices of the federal judicial branch of government. The concept of judicial review is exemplified in the cases that have come before the Court, which are treated at this site: <www.supremecourtus.gov/index.html>.

References and ERIC Resources. The following list of resources includes references used to prepare this Digest. The items followed by an ED number are available in microfiche and/or paper copies from the ERIC Document Reproduction Service (EDRS). For information about prices, contact EDRS, 7420 Fullerton Road, Suite 110, Springfield, Virginia 22153-2852; World Wide Web <edrs.com>; telephone numbers are (703) 440-1400 and (800) 443-3742. Entries followed by an EJ number, annotated monthly in CURRENT INDEX TO JOURNALS IN EDUCATION (CIJE), are not available through EDRS. However, they can be located in the journal section of most larger libraries by using the bibliographic information provided, requested through Interlibrary Loan, or ordered from commercial reprint services.

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